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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 MANUEL J. TORRES,) No. C 07-1204 CW (PR)
4 Plaintiff,) ORDER DISMISSING COMPLAINT
5 v.) WITH LEAVE TO AMEND
6)
7 CITY OF SAN JOSE, ET AL.,)
8 Defendants.)
_____)

9 INTRODUCTION

10 Plaintiff Manuel J. Torres, an inmate in the Santa Clara
11 County Jail, filed this civil rights action pursuant to 42 U.S.C.
12 § 1983 against the City of San Jose, the San Jose Police
13 Department, and San Jose police officers. He seeks leave to
14 proceed in forma pauperis. Venue is proper in this district
15 because the acts complained of occurred in Santa Clara County,
16 which is located in this judicial district. 28 U.S.C. §§ 84(a),
17 1391(b).

18 BACKGROUND

19 Plaintiff alleges in the complaint that San Jose Police
20 Officers Fretias (#3370) and Lisus (#3321) "beat [him] and broke
21 [his] back without any form of inticement [sic] or being provoked."
22 According to Plaintiff, the officers "grabbed [him]" and started
23 "twisting and turning [him] down to the ground onto [his] stomach."
24 He adds, "Officer Fretias [sic] partner began twisting [his] leg as
25 [he] plead to him not to break it." He claims that the other
26 officer asked Officer Fretias if Plaintiff was resisting, and
27 Officer Fretias stated, "No." However, Plaintiff alleges that he
28 "was still punched in the face and stomach." Plaintiff was

1 concerned that his back was broken, but he claims that "Officer
2 Fretias was only concerned about getting information about drug
3 dealers."

4 DISCUSSION

5 A federal court must conduct a preliminary screening in any
6 case in which a prisoner seeks redress from a governmental entity
7 or officer or employee of a governmental entity. 28 U.S.C.
8 § 1915A(a). In its review, the court must identify any cognizable
9 claims and dismiss any claims that are frivolous, malicious, fail
10 to state a claim upon which relief may be granted or seek monetary
11 relief from a defendant who is immune from such relief. 28 U.S.C.
12 § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally
13 construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
14 (9th Cir. 1988).

15 The use of excessive force by a law enforcement officer in
16 effectuating an arrest states a valid claim under 42 U.S.C. § 1983.
17 See Graham v. Connor, 490 U.S. 386, 394-95 (1989). Here, however,
18 Plaintiff has failed to allege some important facts regarding the
19 alleged use of force, such as the date or location of the use of
20 force and whether it took place during arrest or at some other
21 time. While Plaintiff alleges what Officer Fretias and his partner
22 did individually to contribute to the alleged use of excessive
23 force, he does not do the same for Officer Lisus. He does not
24 clarify if Officer Lisus is Officer Fretias's partner. To state a
25 cognizable claim against individual defendants, a plaintiff must
26 "set forth specific facts as to each individual defendant's" role
27 in depriving plaintiff of his protected rights. See Leer v.
28 Murphy, 844 F.2d 628, 634 (9th Cir. 1988). Furthermore, liability

1 may be imposed only if the plaintiff can allege and show that the
2 defendant actually and proximately caused the deprivation of a
3 federally protected right. See id.

4 Accordingly, the Court dismisses the complaint with leave to
5 amend to set forth additional facts regarding the alleged use of
6 force, and to set forth specific facts showing that each individual
7 defendant's actions proximately caused a violation of Plaintiff's
8 constitutional rights, provided he can do so in good faith.

9 Plaintiff also names the San Jose Police Department as a
10 defendant in this action. Plaintiff cannot sue the San Jose Police
11 Department as an entity. Therefore, his claim against the San Jose
12 Police Department will be dismissed without prejudice to filing an
13 amended complaint naming individual San Jose police officers.

14 Finally, Plaintiff has not alleged grounds for municipal
15 liability against the City of San Jose based on any theory other
16 than that of respondeat superior. This is not a sufficient ground
17 for municipal liability. See Monell v. Dep't of Social Servs., 436
18 U.S. 658, 691 (1978) (local governments cannot be liable under
19 § 1983 under respondeat superior theory). Accordingly, the claims
20 against the City of San Jose are DISMISSED with leave to amend. If
21 Plaintiff can in good faith assert facts which state
22 constitutionally cognizable claims for relief against this
23 municipal Defendant he may include them in his amended complaint.

24 CONCLUSION

25 For the foregoing reasons, the Court hereby orders as follows:

- 26 1. The complaint is dismissed with leave to amend.
- 27 2. Plaintiff may file an amended complaint on the Court's
- 28 civil rights form within thirty (30) days from the date of this

1 Order. If he does not, the case will be dismissed without
2 prejudice and leave to proceed IFP will be denied. If he does file
3 an amended complaint, he must put the case number of this case --
4 Case No. C 07-1204 CW (PR) in the appropriate place in the caption
5 on the first page, and write "AMENDED COMPLAINT" on the first page
6 so the complaint is not mistaken for an attempt to open a new case.
7 Because an amended complaint completely replaces the original
8 complaint, Plaintiff must include in it all the claims he wishes to
9 present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.),
10 cert. denied, 506 U.S. 915 (1992); King v. Atiyeh, 814 F.2d 565,
11 567 (9th Cir. 1987); London v. Coopers & Lybrand, 644 F.2d 811, 814
12 (9th Cir. 1981). He may not incorporate material from the original
13 complaint by reference. It is Plaintiff's duty to provide a
14 complaint that is a complete statement of all of his claims against
15 each of the defendants.

16 3. The Clerk of the Court shall send Plaintiff a blank civil
17 rights form along with a copy of this Order. He need not complete
18 the portion of the form which relates to IFP status. The Court
19 will review Plaintiff's IFP application if he complies with the
20 requirements set forth in this Order.

21 4. It is Plaintiff's responsibility to prosecute this case.
22 Plaintiff must keep the court informed of any change of address and
23 must comply with the Court's Orders in a timely fashion. Failure
24 to do so may result in the dismissal of this action for failure to
25 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

26 IT IS SO ORDERED.
27 DATED: November 14, 2007



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MANUEL J TORRES,
Plaintiff,

Case Number: CV07-01204 CW

CERTIFICATE OF SERVICE

v.

CITY OF SAN JOSE et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 20, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Manuel Torres CNC-226
885 North San Pedro Street
San Jose, CA 95110

(with blank civil rights form)

Dated: November 20, 2007

Richard W. Wicking, Clerk
By: Clara Pierce, Deputy Clerk